HOO LEE DEVELOPMENT SDN. BHD. v. SHELL MALAYSIA TRADING SDN. BHD.

[O.C.J. (Mohamed Dzaiddin J.) February 6, April 13 & September 3, 1984]

[Penang – Originating Summons No. 329 of 1981]

Land Law – Application for Order to surrender land – Application to relevant authority for approval to subdivide and construct buildings on land – Approval on condition to surrender portion of land to the government – Wrong procedure in beginning action – Defendant not prejudiced by irregularity – National Land Code, s. 197.

By Conveyance dated March 18, 1952, Lot 121(1) Mukim 15, Province Wellesley North was conveyed and transferred to the defendant. In 1957 the defendant applied to the relevant authority for approval to subdivide and construct buildings on the said land. The relevant authority approved the said application on condition that the defendant surrender a portion of the said land fronting the road, free of cost to the State Government. The defendant submitted the plan for subdivision which was approved by the Chief Surveyor of Penang on September 23, 1957 whereby Lot 121(1) was subdivided into two lots namely, Lots 919 and 920. Lot 919 was intended to be surrendered to the State Government and subsequently became Lot 1036.

The defendant did not proceed with its building plans but sold Lot 920 to one Ko Sun Siew for $20,000 on March 24, 1958. Ko transferred the said land to Chen Ko Ming and 13 others on November 20, 1974. The plaintiff became the registered proprietor on October 6, 1978.

It applied to the Majlis Perbandaran Seberang Perai for subdivision and planning approval to erect buildings on the said lot. The application could not, however, be considered by the M.P.S.P. unless Lot 919 was surrendered to the government.

The plaintiff in this application asked the Court for an Order that the defendant do surrender land Lot No. 1036, Section 4, Bandar Butterworth, formerly known as Lot 919 to the Government of Penang under Section 197 of the National Land Code 1965 in accordance with the conveyance dated March 24, 1958.

There were three main issues in this application:

(1) What was the proper construction to be given to the Conveyance of March 24, 1958?

(2) the right of the plaintiff to claim any relief under the said Conveyance which was alleged to have been no longer operative and in existence and

(3) limitation.

At the hearing, counsel for the defendant took up a preliminary objection on procedure. He submitted that the action, being one of specific performance of a covenant in a conveyance should be by writ.

Held: (1) the procedure adopted by the plaintiff was wrong. It should have filed a civil suit seeking a declaration or an order that the defendant do surrender the said land to the State Government of Penang. However, as the defendant was not prejudiced or embarrassed by such an irregularity, the defendant's objection was overruled;

(2) the defendant as successor-in-title was bound by the covenant or undertaking to surrender land Lot. No. 1036, formerly known as Lot. 919 to the State Government of Penang;

(3) the dispute here was not as to the title or ownership of Lot 919 as to attract section 9 of the Limitation Act 1953;

(4) the conduct of the plaintiff up to the date of filing this application did not amount to being guilty of laches or undue delay.

Cases referred to:

(1) *Beaumont* v. *Marquis of Salisbury* (1854) 19 Beav. 198.
(2) *Aspdin* v. *Austin* (1844) 5 Q.B. 671.
(3) *Mackenzie* v. *Childers* (1890) 43 Ch. D. 265.
(4) *Bensley* v. *Burdon* [1930] 8 L.J. Ch. 85.

HIGH COURT.

R. Rajasingam for the plaintiff.
N.G. Sivanandan for the defendant.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: In this application, the Plaintiff is asking this Court for an Order that the Defendant do surrender land Lot No. 1036, Section 4, Bandar Butterworth – formerly known as Lot 919 – ("the said Land") to the Government of Penang under section 197 of the National Land Code 1965 in accordance with the Conveyance dated March 24, 1958.

By Conveyance dated March 18, 1952, Lot 121 (1) Mukim 15, Province Wellesley North was conveyed and transferred to Shell Company of the Federation of Malaya Limited. Some time in 1957 the said Shell Company applied to the relevant authority for approval to subdivide and to construct buildings on the said land. The relevant authority approved the said application on condition that the said Shell Company surrender a portion of the said land fronting the road, free of cost to the State Government. In accordance with the said requirement, the said Shell Company submitted the plan for subdivision which was approved by the Chief Surveyor of Penang on September 23, 1957 whereby Lot 121(1) was subdivided into two lots namely, Lots 919 and

920. This Lot 919 was intended to be surrendered to the State Government and subsequently became Lot 1036.

After the subdivision, it appeared that the said Shell Company did not proceed with its plan to erect any building, but sold the other subdivided Lot 920 ("the said Lot") to one Ko Sun Siew for $20,000 by the Indenture of Conveyance dated March 24, 1958. Then on November 20, 1974, Ko transferred the said land to Chen Ko Ming and 13 others. When the Plaintiff became the registered proprietor on October 6, 1978, the Company submitted an application to Majlis Perbandaran Seberang Perai for subdivision and planning approval to erect buildings on the said lot. The application could not, however, be considered by M.P.S.P. unless Lot 919 was surrendered to the government.

At the hearing on March 2, 1984, Mr. Sivanandan, counsel for the defendant took up a preliminary objection on procedure. He submitted that the action, being one of specific performance of a covenant in a conveyance, should be by a writ. Mr. Rajasingam, counsel for the plaintiff, on the other hand, in conceding that it ought to have been started as a writ, nevertheless contended it was only an irregularity which should not nullify the present proceedings.

I agree that the procedure adopted by the Plaintiff in this proceeding was wrong. It should have filed a civil suit seeking a declaration or an order that the Defendant do surrender the said land to the State Government of Penang. However, after examining the affidavits of parties and documents attached thereto I do not see any serious dispute at all as to the facts. The matters in dispute relate more to the questions of law and the construction of the conveyance. In addition, I do not think the Defendant will be prejudiced or embarrassed by such an irregularity. I feel that the present proceeding by way of originating summons be continued. In the circumstances I overruled the Defendant's objection.

From my reading of the written submissions of counsel and supporting affidavits of the parties there appear to be three main issues in this application: (1) what is the proper construction to be given to the Conveyance of March 24, 1958? (2) the right of the Plaintiff to claim any relief under the said Conveyance which was alleged to have been no longer operative and in existence and (3) limitation.

On the first issue, the question is, what is the true intent and meaning of the Conveyance of March 24, 1958? Does it merely contain the obligation of the Defendant to sell Lot 920 for the consideration of $20,000? This conveyance contained twelve recitals and one operative part, which reads as follows:

"Now This Indenture Witnesseth that in consideration of the sum of Dollars Twenty thousand ($20,000/-) paid by the Purchaser to the Vendor-Company on or before the execution of these presents (the receipt whereof the Vendor-Company hereby acknowledges) the Vendor-Company hereby conveys and the Confirming Company, at the request of the Vendor-Company, hereby conveys and confirms unto the Purchaser All that piece of land and hereditaments hereinafter described in the Schedule hereto To Hold the same unto the Purchaser in fee simple."

Counsel for the Defendant had submitted that what was abundantly clear in the said Conveyance was that the Defendant sold just a piece of land known as Lot 920 to the Purchaser for the sum of $20,000. Counsel further argued that the Recitals, in particular Clause 7 were merely expressing what the intentions were prior to the sale and they were in no way to be construed that Lot 919 was to be surrendered by the Defendant after the conclusion of the sale of Lot 920. On the other hand, counsel for the Plaintiff had submitted that by Clause 7 of the Recital there was a deliberate representation held out by the Vendor to the Purchaser without which the sale of Lot 920 might not have materialized. Hence, he had contended that the Recitals, in particular Clause 7 of the said Conveyance should form the operative part of the document.

Clause 7 reads as follows:–

"The said Lot 919 was to be set aside free of cost for the Government of the State of Penang in compliance with its scheme for the widening of Pantai Road otherwise it would not sanction the erection of any buildings on the said Lot 920 which the Vendor Company has intended to erect."

Assuming I accept the submission of the counsel for the defendant, this Court therefore is precluded from considering Recital 7 of the Conveyance to find out the intentions of the parties but merely to consider the operative part of the deed. He cited the case of *Beaumont* v. *Marquis of Salisbury*[1] at p. 206 where Romilly M.R. said:

"Court deals with a deed according to the clear intention of the parties appearing in the four corners of the deed itself."

I am clearly of the opinion that the Recitals in the said Conveyance are not merely recitals of an introductory nature. They appear to be clear manifestation of the intention of the parties and thus create a binding covenant. "Where words of recital or reference manifested a clear intention that the parties should do certain acts, the court have from these inferred a covenant to do such act.": per Lord Denman C.J. in *Aspdin* v. *Austin*[2] at p. 683. In *Mackenzie* v. *Childers*[3], it was held that a recital of the intention to create a restrictive covenant on the part of the Vendor who executed the Deed and inserted it as the inducement to Purchasers to buy may operate as if it were a formal covenant contained in the operative portion of the Deed. In the present case, Clause 7 of the Recital seems to have manifested a clear intention on the part of the Vendor Company to set aside Lot 919 for the Government of Penang for its road widening scheme, for otherwise not only the approving authority would not approve the Defendant's application for subdivision and construction of any buildings on Lot 920, but the Plaintiff's predecessor-in-title might not have purchased it.

I am also of the opinion that in the circumstances of the case, the Defendant is estopped from contradicting what was stated in Clause 7. This is called estoppel by deed, which is a rule of evidence. In order to have this effect, the recital must be clear, precise and unambiguous. "A general recital will not operate as an estoppel, but the recital of the particular fact will have that effect.": per Lord Lyndhurst L.C. in *Bensley* v. *Burdon*[4] at p. 87. In fact, it is clearly stated in *Odgers'* Construction of Deeds and Statutes, 5th edition at p. 155 that "Where a recital does operate as an estoppel it must be a statement of a material fact and will take effect, if at all, as between the parties to the deed and persons claiming by or through, under or in trust for those parties." Thus, having held that the recitals in the said conveyance formed the operative part of the deed, the Defendant as successor-in-title is bound by the covenant or undertaking to surrender Lot 919 to the State Government of Penang.

On the second issue, the learned counsel for the defendant had submitted that pursuant to section 90(2) of the National Land Code (Penang and Malacca Titles) 1963, the said Conveyance of March 24, 1958 was no longer operative. The Commissioner of Land Titles had cancelled and impounded all previous deeds on June 6, 1980 and a final title in respect of the said lot was issued on March 2, 1981. Hence, the title had become indefeasible and the Plaintiff was precluded from claiming any interest which the purchaser of Lot 920 might have conferred on him.

In my view, the Plaintiff here is not disputing the title to either Lot 919 or 920 or claiming recovery of the two said lots. If that is the case, then I entirely agree that he is precluded by virtue of sections 89 and 90(2) of the National Land Code (Penang and Malacca Titles) 1963. It must be clearly recognized that the Plaintiff is seeking an equitable relief that the Defendant be ordered to surrender Lot 919 to the Government of Penang in compliance with its scheme for road widening, failing which the State Authority would not approve the Plaintiff's application for subdivision of his Lot 920. Under section 36 of the same Act, the Conveyance of March 24, 1958 does appear to me to have effect not only as evidence of the nature and extent of the interest but would operate as affecting the rights and liabilities of parties in equity. Section 36 states as follows:

> "Subject to the provisions of this Act, upon the appointed day all pre-existing interests in all land in the State shall be extinguished and there shall be vested in all persons in whom were vested such interests such corresponding interests in the holdings created in relation to such lands under the provisions of this Act, and the right to such replacement titles to such holdings, as are provided by this Chapter; and unless otherwise provided by this Act, every pre-existing deed relating to a holding shall, on and after the appointed day, have effect only as evidence of the nature and extent of any pre-existing interest in such holding:
>
> Provided that except in so far as any other provision is made by this Act nothing in this section shall be construed as preventing any such deed from operating as a contract, or as affecting the rights or liabilities of any person thereunder, either at law or in equity."

In the circumstances, the Defendant's submission on the second issue must fail.

Lastly, on the question of limitation, the supplementary affidavit of Mr. Harbhajan Singh affirmed on behalf of the Defendant on January 31, 1984 stated that the action brought by the Plaintiff was out of time under the Limitation Act 1953. Counsel for the defendant had submitted that the said Act applies to the present case as it is a covenant in a conveyance. Therefore, it was submitted that, as the Conveyance

was made on March 24, 1958 the twelve year period would end in 1970 and since this application commenced in 1981 the Plaintiff's action is thus statute-barred under section 9 of the Limitation Act 1953.

Counsel referred to certain paragraphs in *Megarry's*, The Law of Real Property at p. 607 where it is said that the covenants are subject to the usual period of limitation (twelve years). Under the footnote, this provision refers to the English Limitation Act 1939, section 2(3). I have taken time to consider this point, but unfortunately there is no similar provision in our Limitation Act 1953. Nowhere is it mentioned in our Act of an action upon speciality as submitted by counsel. The relevant section of our Limitation Act is section 9(1) which is limitation of actions to recover land and "land" under section 2 includes "things attached to the earth or permanently fastened to anything attached to the earth, rent charges and any legal or equitable estate or interest in land including an interest in the proceeds of sale of land held upon trust for sale but save as aforesaid does not include any right of way, easement, servitude, profit over or in respect of land, or right in the nature of an easement, servitude or profit over or in respect of land, or any other incorporeal hereditament.". Again, section 2(4) says that references in the Act to a right of action to recover land shall include references to a right to enter possession of the land.

After considering the matter, I am of the opinion that the dispute here is not as to the title or ownership of Lot 919 as to attract section 9 of the Limitation Act 1953. In such circumstances, the issue of limitation does not arise.

Having disposed of the issues in this application, there is of course one final point which this Court has to consider before exercising its discretion to grant the Plaintiff's application. It was contended by the counsel for the defendant in his written submission dated April 11, 1984 under 'delay and laches' that the Plaintiff became the registered owner of Lot 920 on October 6, 1978. He filed the action on August 6, 1981. Then, without any written intimation to the Defendant, the Plaintiff made an application to Majlis Perbandaran, Seberang Perai to subdivide the said Lot by including Lot 919, the Defendant's property. I take it that the intention of counsel here is to show to this Court that the Plaintiff was guilty of laches and delay which would warrant me not to exercise my discretion in favour of the Plaintiff. Having considered the two affidavits of Goh Kim Choon, the Chairman of the Plaintiff's Company, showing the circumstances which made the Plaintiff file this application on August 6, 1981, I am satisfied that the conduct of the Plaintiff up to the date of filing this application does not amount to being guilty of laches or undue delay.

For the above reasons I allow the Plaintiff's application by ordering that the Defendant do surrender Lot No. 1036 (formerly Lot 919) Section 4, Bandar Butterworth to the Government of Penang and the Registrar of Land Titles, Penang do register and give effect to this Order. The costs of this application to the Plaintiff.

Application allowed.

Solicitors: *R. Rajasingam; Presgrave & Matthews.*

ONG LEAN SIM & ANOR. v. TIO KAH HIN & ORS.

[O.C.J. (Mohamed Dzaiddin J.) July 23, 1984 & September 3, 1984]
[Penang – Civil Suit No. 668 of 1982]

Practice and Procedure – Defence – Action to strike out – Defence filed disclosed no reasonable defence – Defence frivolous or vexatious or tends to delay fair trial of action – R.H.C. 1980, O. 18 r. 19(1).

Landlord & Tenant – Lease for 10 years – Claim for delivery of vacant possession, mesne profit and costs – Set-off and counterclaim – Delay in applying to strike out defence and counterclaim – Delay has not caused any injustice to either side.

By a lease registered under the National Land Code the plaintiffs granted to the first and second defendants a lease of premises No. 97, Burmah Road, Penang for ten years from January 11, 1971 to January 10, 1981. After expiry of the lease, the first and second defendants continued to remain on the premises on a monthly tenancy. On July 12, 1982 the plaintiffs through their solicitors gave written notice to quit and to deliver vacant possession on August 31, 1982. The plaintiffs now claim for delivery of vacant possession, mesne profit and costs. As against the third defendant, the plaintiffs alleged that he was a trespasser on a portion of the said premises.

In defence, the first and second defendants claimed that after the expiry of the ten-year lease, they continued